who took it with notice of the insurer's rights.[15] All of these facts fit into the notion that whatever one may become entitled to be subrogated to is substantially a trust *res*.

In some instances the notion of a trust is avowedly applied to the subject-matter of a right of subrogation. This seems to explain the right of creditors of an insolvent trustee authorized to continue the testator's property in a business, to proceed against that property.[16] The same principle accounts for a creditor's right to security held by the surety for the payment of the debt,[17] a class of cases illustrated by *People* v. *Metropolitan Surety Co.* (1911) 132 N. Y. Supp. 835. In that case both principal and surety were insolvent, and the former had deposited certain cash with the latter as collateral to his bond. This the court held that the creditor was entitled to reach as a *cestui que trust*. A distinction, however, is taken between cases where the security was given as a provision for the payment of the debt in case of default by the principal, and where it is held strictly for the personal indemnity of the surety.[18] In the former case the creditor may reach the security as being impressed with a trust for payment of the debt,[19] and accordingly in such case the creditor's lien seems to rest on intention. But although this cannot be true where the security was strictly for the surety's personal protection, even here the creditor's equity is held to exist, at any rate where surety and principal are both insolvent.[20] The explanation of this must be that as a surety can reach his creditor's security, so equity will impress a trust in favor of the latter on property in the former's hands in any way dedicated to meeting liabilities connected with the obligation in question. Had the surety met the debt the security would have been lost to the principal's general creditors, and would substantially have reached the hands of the particular one. Accordingly it seems proper that equity should raise a trust in the latter's favor rather than that the general creditors should profit at his expense by an event so little concerning them as the surety's insolvency.[21]

EFFECT UPON PRIOR WILL OF THE NULLIFICATION OF SUBSEQUENT REVOKING OR INCONSISTENT WILL.—The principle that a republication is necessary to make effective a will which has been rendered void, was

[15]Hart *v.* Railroad *supra;* West of England Fire Ins. Co. *v.* Isaacs L. R. [1897] 1 Q. B. 226.

[16]Strickland *v.* Symons (1884) L. R. 26 Ch. Div. 245; Lewin, Trusts, (12th ed.) § 794-*a;* see Laible *v.* Ferry (1880) 32 N. J. Eq. 791.

[17]Daniel *v.* Hunt *supra;* Chambers *v.* Prewitt (1898) 172 Ill. 615; Vail *v.* Foster (1850) 4 N. Y. 312; Eastman *v.* Foster *supra.*

[18]Sheldon, Subrogation, (2nd ed.) § 160.

[19]Sheldon, Subrogation, (2nd ed.) §§ 154, 155; Daniel *v.* Hunt *supra;* Chambers *v.* Prewitt *supra;* Vail *v.* Foster *supra;* Eastman *v.* Foster *supra.*

[20]Sheldon, Subrogation, (2nd ed.) §§ 160, 162; *In re* Fickett (1881) 72 Me. 266; Kelly *v.* Herrick (1881) 131 Mass. 373; Thompson *v.* Taylor (1878) 12 R. I. 109; Keyes *v.* Brush (N. Y. 1830) 2 Paige 311.

[21]In the principal case the cash security had all been paid out by the surety and nothing substituted for it. Inasmuch as there was consequently no trust *res* which could be identified, it seems impossible to sustain the result. Cavin *v.* Gleason (1887) 105 N. Y. 256; see Taylor *v.* Plumer (1815) 3 M. & W. 562.

early recognized by the common law courts,[1] and while prior to the Statute of Frauds such republication could be proved by parol,[2] Lord Hardwick held in *Martin* v. *Savage*[3] that under the Statute parol evidence was inadmissible to sustain the republication of a devise of lands. But in the case of wills of personalty, the ecclesiastical courts continued to recognize oral republications[4] until forbidden by the Wills Act in 1838.[5] What should constitute a revocation, however, was a question of considerable difficulty. The mere making of a second will did not *ipso facto* nullify all other wills,[6] and where it could not be proved that by the second will the first was in fact revoked, it was allowed to stand on destruction of the second,[7] not because it had been revived, but because it had never ceased to exist.[8] It is apparently a failure to grasp this distinction which has led to the prevalent doctrine that a revoked will may be revived by a destruction of the revoking instrument, when coupled with an intention that the former should stand,[9] or, according to some cases, regardless of intent.[10] Both of these lines of decisions, however, as applied to wills of realty, disregard the Statute of Frauds as well as the early decision of Lord Hardwick.[11] It is true that in the case of *Harwood* v. *Goodright*[12] Lord Mansfield, by way of dictum, laid down some such rule, but his statement loses much force when taken in connection with the fact that the contestants in that case failed to prove any revocation of the first will, and the decision was placed expressly upon that ground.[13]

In those States of this country where the question has not been settled by statute,[14] the decisions are in hopeless conflict. A number of courts have followed literally the dictum of Lord Mansfield and

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[1]Burtonshaw *v.* Gilbert (1774) Cowp. 49; 4 Kent, Com., *532. The same view was taken by the early American cases. Witter *v.* Mott (1816) 2 Conn. 67; Warner *v.* Warner's Estate (1864) 37 Vt. 356.

[2]Beckford *v.* Parnecott (1595) Cro. Eliz. 493.

[3](1740) Barnardiston Ch. 189.

[4]Usticke *v.* Bawden (1824) 2 Add. Ecc. 116, 125; Emerson *v.* Boville (1802) 1 Phillimore 342.

[5]Major *v.* Williams (1843) 3 Curt. Ecc. 432.

[6]Harwood *v.* Goodright (1774) Cowp. 87.

[7]Harwood *v.* Goodright *supra;* see also Goodright *v.* Glazier (1770) 4 Burr. 2512.

[8]Harwood *v.* Goodright *supra;* Goodright *v.* Glazier *supra.*

[9]Colvin *v.* Warford (1863) 20 Md. 357; *In re* Gould's Will (1900) 72 Vt. 316; Williams *v.* Miles (1903) 68 Neb. 463; see Pickens *v.* Davis (1883) 134 Mass. 252.

[10]Flintham *v.* Bradford (1848) 10 Pa. 82; Stetson *v.* Stetson (1903) 200 Ill. 601; see Randall *v.* Beatty (1879) 31 N. J. Eq. 643.

[11]Martin *v.* Savage *supra.*

[12]See note 6 *supra.* Mansfield, C. J., "If a subsequent will either virtually or expressly revoking a former will be destroyed, the former if subsisting, is revived." See 4 Kent, Com., *532.

[13]In Goodright *v.* Glazier *supra,* the decision also proceeded upon the premise that the first will had never been revoked.

[14]In New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas and Virginia, statutes similar to the English Wills Act have been enacted. See Schouler, Wills, § 415.

held that a revoking will is ambulatory in character, and of no effect if destroyed before the testator's death.[15] The fallacy of this argument lies in a failure to appreciate that a clause of revocation inserted in a will is unnecessary to its testamentary validity, and should be treated as a separate instrument of immediate operation, which *eo instanti* renders void the prior will.[16]

A number of courts, however, while sustaining this principle, nevertheless have held that the prior will is revived by a destruction of the revoking instrument, if the testator so intended.[17] This position was taken in a recent Iowa case, *Blackett* v. *Ziegler et al.* (1911) 133 N. W. 901, where a subsequent will, which in express terms revoked a former will was destroyed by the testatrix desiring to set up the first, and the court admitted parol evidence of her declarations of intention to sustain a revival. But if it is conceded that the revocatory clause operates at once, it would seem that for all legal purposes the will is void and can have no effect unless republished.[18] It follows, therefore, that to base a revival solely upon the testator's oral declarations of intention is simply to permit a republication by parol in violation of the Statute of Frauds.[19] A further distinction has sometimes been drawn between cases where the second will contained an express clause of revocation, and those where it was only inconsistent with the first, and the conclusion reached that in the former class the revocation operates immediately, but in the latter not until the testator's death.[20] Since, however, a revocation depends upon a present intention to revoke, rather than upon words, it would seem that on principle the question whether an inconsistent will operates as a present revocation should depend upon the intention of the testator to be gathered from extrinsic circumstances. But an express clause of revocation in the second will is an unequivocal expression of intention that the revocation be immediately effected; it is a complete verbal act, and it is submitted that a will thus revoked is as completely destroyed as if it had been cancelled, and a revival should not be allowed unless the will is republished in compliance with the Statute of Frauds. While only a few courts have followed this view,[21] the fact that a formal republication is required in those jurisdictions where the question has been regulated by statute,[22] would seem to indicate that it conforms with the dictates of sound policy.

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[15]Flintham *v.* Bradford *supra;* Stetson *v.* Stetson *supra;* Randall *v.* Beatty *supra;* Taylor *v.* Taylor (S. C. 1820) 2 N. & McC. 482.

[16]James *v.* Marvin (1821) 3 Conn. 376; Hawes *v.* Nicholas (1889) 72 Texas 481.

[17]Colvin *v.* Warford *supra;* Williams *v.* Miles *supra;* Pickens *v.* Davis *supra.*

[18]Gardner, Wills, 274 n.

[19]Martin *v.* Savage *supra.*

[20]Cheever *v.* North (1895) 106 Mich. 390; Page, Wills, § 273. This distinction is criticized in 15 Harv. L. Rev. 142.

[21]Harwell *v.* Lively (1860) 30 Ga. 315; *In re* Noon's Will (1902) 115 Wis. 299; Scott *v.* Fink (1881) 45 Mich. 241; Danley *v.* Jefferson (1908) 150 Mich. 590.

[22]Schouler, Wills. § 415 n. 1; Rudisill's Ex'r *v.* Rodes (Va. 1877) 29 Gratt. 147.